

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA	:	CRIMINAL ACTION
v.	:	
ALEXANDER LEBED	:	NO. 05-362-01 and 02
LARISA LEBED	:	

MEMORANDUM

Baylson, J.

August 12, 2005

I. Summary of Allegations of Indictment

The Grand Jury indictment of Alexander Lebed and Larisa Lebed, spouses, charges the defendants with 26 counts of wire fraud in violation of 18 U.S.C. § 1343, eight counts of mail fraud in violation of 18 U.S.C. § 1341, and 95 counts of laundering monetary instruments over \$10,000 in violation of 18 U.S.C. § 1957. Together, the allegations reflect a fraudulent scheme to receive and misappropriate approximately \$13 million in federal Pell Grants awarded to students at CSC Institute (“CSC”), a private vocational school owned by the defendants.

II. Summary of Government’s Motion to Disqualify Counsel for Conflict of Interest

The government posits three bases for its Motion to Disqualify Counsel for Conflict of Interest, regarding attorney Arthur R. Shuman, counsel of record for each defendant: (1) his prior representation of all of the defendants’ employees during a parallel civil/administrative proceeding, at least four of whom will be government witnesses at trial; (2) his prior representation of two essential government witnesses during their grand jury testimony; and (3) his current representation of both defendants.

First, the government argues a case of divided loyalties arises from Mr. Shuman’s alleged

past representation of all CSC employees, including Ms. Pyasik and Mr. Sinyukov, in the administrative hearings and at the grand jury, and his present representation of the Lebeds. Several of these former CSC employees will be prosecution witnesses at trial. The alleged divided loyalties create an actual or potential conflict of interest that should disqualify Mr. Shuman, contends the government.

Even where the defendants and witnesses waive any conflict, the government correctly argues the district court has an independent power and obligation to determine if a conflict of interest actually or potentially exists, and if so, to disqualify affected counsel. The government asserts the conflict waivers by Ms. Pyasik and Mr. Sinyukov are problematic and illusory, as they are each now represented by attorney Richard Michaelson, who lists Mr. Shuman as “of counsel” to his firm; and because certain affirmances in the waivers, made by affidavit, are contrary to the grand jury testimony of Ms. Pyasik and Mr. Sinyukov. Finally, the government argues attorney disqualification for conflict of interest is especially appropriate where, as here, witnesses involved in alleged divided loyalties are central to the entire case against defendants.

The government contends a separate conflict arises from Mr. Shuman’s joint representation of the Lebeds. It argues instances of joint representation require automatic scrutiny by the trial judge of potential or actual conflict of interest. It further argues that, because an intelligent waiver is difficult to effect, any waiver of conflict by the Lebeds could only dubiously coexist with a secure Sixth Amendment right to effective assistance of counsel, and would leave a guilty verdict, with respect to the Lebeds, open to post-conviction attack.

The government contends that married defendants sharing a lawyer are particularly vulnerable to losing that attorney’s undivided loyalty during the course of plea negotiations and

trial, where divergent interests of the spouse-defendants may arise. Likewise the government contends conflict waivers by spouse-defendants merit careful scrutiny, as such defendants may find it especially hard to perceive possibly divergent interests at trial. Thus the government urges the court to override any conflict waiver by the Lebeds in the interests of trial integrity, legal ethics, and fairness to the defendants, and to disqualify Mr. Shuman as counsel to both Mr. and Mrs. Lebed.

III. Summary of Defendants' Response to Government's Motion to Disqualify Counsel

Countering the government's Motion, Mr. Shuman argues that he should not be disqualified because (1) there is no serious potential that a conflict will arise at trial; (2) the Lebeds have each waived their right to conflict-free counsel; and (3) each of the defendants is also separately represented by an independent attorney, and will continue to be so represented.

Mr. Shuman contends each defendant's Sixth Amendment right to effective counsel, including the right to be represented by the attorney of one's choice, ought to dictate that he not be disqualified from representing either. Further, Mr. Shuman asserts that the government's legal analysis pertains to issues and cases entirely inapposite to the instant case. Mr. Shuman describes these putatively irrelevant issues as those raised "(1) [...] when an attorney represents both witnesses and a defendant in a criminal matter, and (2) [...] by an attorney's simultaneous representation of two defendants in the same criminal case."

As dual representation, the potential for conflict, and whether such conflict would be "actual," Mr. Shuman contends, is determined through a factual analysis sensitive to the circumstances of the particular case.

In the instant case, Mr. Shuman argues that, because the Lebeds are accused together of

committing identical crimes and intend to mount an identical defense, divergent interests between them which could generate conflict are unlikely. The fact of separate, independent co-counsel for each, in addition to Mr. Shuman, makes conflict in the present arrangement, or successful post-trial appeal because of Sixth Amendment violations, “inconceivable.”

IV. Facts

The following facts are found from the parties’ submitted briefs and the pretrial hearings on this issue on July 15, 2005, and August 8, 2005.

During administrative hearings in January, 2005, regarding emergency action taken by the Department of Education to terminate CSC’s eligibility to receive federal education funding, Mr. Shuman entered his appearance “on behalf of CSC Institute, Inc., and its employees.” In proceedings before Judge Richard F. O’Hair, administrative law judge from Washington, D.C., Mr. Shuman and his co-counsel Mr. Steven Gombos called as witnesses Anna Pyasik, Anatoly Sinyukov and four other former CSC employees.

All of these former CSC employees also testified before the subsequent federal grand jury investigation of the Lebeds and are actual or potential government witnesses in the present case.

As regards the grand jury, in accordance with Mr. Shuman’s instructions of January, 2005, the government served all grand jury subpoenas of CSC employees on Mr. Shuman, who accepted service.

On February 16, 2005, Mr. Shuman accompanied Ms. Pyasik and Mr. Sinyukov for their grand jury testimony. Ms. Pyasik testified first, and in her testimony asserted that Mr. Shuman was her attorney. During his testimony, Mr. Sinyukov likewise named Mr. Shuman as his attorney. However, Ms. Pyasik and Mr. Sinyukov have each since asserted, by affidavit, that Mr.

Shuman did not represent them as their attorney at the grand jury, never had an attorney/client relationship with either of them, and was to their knowledge the attorney for CSC Institute, not their personal attorney. This contradiction, although troubling, has been clarified to some extent.

During his grand jury testimony, Mr. Sinyukov was asked a question about falsifying attendance records at CSC which caused him to request to speak to Mr. Shuman, who was waiting outside. Mr. Sinyukov was excused to speak with Mr. Shuman. Mr. Sinyukov and Mr. Shuman consulted outside the grand jury room for a short period of time. They were both consistent on the facts of their discussion. Sinyukov told Shuman that he feared incriminating himself by answering questions about falsifying documents. Shuman told Sinyukov that their discussion could not proceed, and immediately notified AUSA Judson Aaron, who was nearby, that he had a potential conflict of interest in advising Mr. Sinyukov further, due to his own anticipated representation of the Lebeds. Mr. Sinyukov and Ms. Pyasik were excused to obtain different counsel.¹ Each subsequently returned and completed their testimony before the grand jury. Both Mr. Sinyukov and Ms. Pyasik will be important witnesses in its case against the Lebeds.

Because of the communications between Mr. Shuman and Mr. Sinyukov and Ms. Pyasik, the Court finds that Mr. Shuman did have an attorney-client relationship with each of them, albeit in a formalistic sense and for a short period of time. The Court finds further that Mr. Shuman did not receive confidential information from Mr. Sinyukov or Ms. Pyasik, and that what information he did receive from them, he conveyed immediately to AUSA Aaron.

¹ Ms. Pyasik and Mr. Sinyukov each hired Mr. Richard A. Michaelson, Esq. to represent them. Mr. Shuman is listed as “of counsel” to Mr. Michaelson’s firm, a point the government raised in its brief arguing for Mr. Shuman’s disqualification, but did not press at the hearing.

As regards joint representation, Mr. Shuman currently is attorney to both Mr. and Mrs. Lebed, each of whom has waived any conflict in their representation by Mr. Shuman. Each defendant also has individual representation in the matter: Mr. Joel Slomsky, Esq., is co-counsel to Mrs. Lebed, and Mr. Steven Gombos, Esq., is co-counsel to Mr. Lebed.²

V. Analysis

Among the rights guaranteed a criminal defendant under the Sixth Amendment is the right to conflict-free representation. United States v. Gambino, 864 F.2d 1064, 1069 (3d Cir. 1990). Also inuring to defendants is the right to representation by counsel of one's choice. U.S. v. Moscony, 927 F.2d 742, 750 (3d Cir. 1991), cert. denied, 501 U.S. 1211 (1991); See also, Wheat v. United States, 486 U.S. 153, 160 (1988). The core issue in questions of attorney disqualification for conflict of interest is the tension between duly respecting the defendant's right to select counsel, and preserving judicial integrity by ensuring the participation of conflict-free attorneys at trial. United States v. Stewart, 185 F.3d 112, 122 (3d Cir. 1999). "A court confronted with and alerted to possible conflicts of interest must take adequate steps to ascertain whether the conflicts warrant separate counsel." United States v. Hawkins, Crim. No. 04-CR-370, 2004 WL 2102017 *3 (E.D. Pa. 2004).

In Hawkins, this Court recently had occasion to review the legal standards applicable to an analysis of potential attorney disqualification for reason of conflict of interest arising out of grand jury testimony. The analysis begins with a presumption of a defendant's entitlement to

² The government makes no contention that Mr. Gombos' appearance as attorney for Mrs. Lebed in the present case creates a conflict of interest like that urged for Mr. Shuman, though Mr. Gombos was Mr. Shuman's co-counsel in the January, 2005, administrative hearing before Judge O'Hair. As noted above, Mr. Shuman's participation in that hearing is one of the government's bases for urging his disqualification as attorney for the Lebeds.

choose his or her attorney, though this presumption may be overcome by a showing of either actual conflict or a serious potential for conflict in the selected attorney. Wheat, 486 U.S. at 160; Moscony, 927 F.2d at 750. A trial court has discretion to order attorney disqualification upon a finding of actual conflict or serious potential conflict, notwithstanding any waiver of conflict by the defendant. Id. “Actual” conflict need not have demonstrable prejudicial consequences, but involves a “lapse in representation contrary to the defendant’s interests” due to the attorney’s conflict. Gambino, 864 F.2d at 1070 (quoting Sullivan v. Cuyler, 723 F.2d 1077, 1086 (3d Cir. 1983)).

In considering whether to accept a defendant’s waiver of attorney conflict, a court must bear in mind several factors, including, “(1) the court’s institutional interest in protecting the truth-seeking function of the proceedings; (2) the defendant’s right to effective assistance of counsel, regardless of the proffered waiver; (3) protection of attorney-client communications, and the candor between counsel and client such protection engenders; (4) promotion of respect for the court in general through enforcement of ethical rules; and (5) protection of a fairly rendered verdict from trial tactics designed to generate issues for appeal.” Hawkins, 2004 WL 2102017 at *4 (citing United States v. Stansfield, 874 F. Supp. 640, 643 (M.D. Pa. 1995), Moscony, 927 F.2d at 749).

In the instant case, though it offers three bases for its Motion, the government’s grounds for seeking Mr. Shuman’s disqualification as the Lebeds’ counsel are essentially two: (1) Mr. Shuman previously represented all CSC employees, including, notably, Ms. Pyasik and Mr. Sinyukov, at both the grand jury investigation and the parallel administrative hearing before Judge O’Hair, and (2) Mr. Shuman currently represents both co-defendants. Each asserted basis

for Mr. Shuman's disqualification will be assessed in turn.

A. The Issue of Divided Loyalties Between Former and Present Clients

Several Third Circuit cases have addressed the issue of when an attorney's so-called "divided loyalties" between a current client who is a defendant in a criminal trial and a former client serving as a prosecution witness create a conflict of interest. A review of such cases indicates that district courts' decisions on disqualification are highly fact-driven. Such must be the inquiry here.

In Moscony, supra, the District Court disqualified a law firm from representing at trial a defendant charged with orchestrating a fraud upon two federal agencies where the firm had represented him, his co-conspirator, and the employees from his company through most of the prior grand jury investigation. Moscony, 927 F.2d at 742. The co-conspirator pled guilty and was to testify for the government at Moscony's trial. Moscony's employees joined the government's motion to disqualify the firm. Id. at 747.

On appeal, the Third Circuit affirmed the disqualification, finding an actual conflict in the firm's pre-trial representation of Moscony, his co-conspirator, and several employees of Moscony, who had substantive knowledge of important facts. The court found that the firm either would have been limited by confidentiality restraints in its cross-examination of witnesses it formerly represented, thus depriving Moscony of his Sixth Amendment right to effective assistance of counsel, or, by unrestrainedly cross-examining those witnesses, would have violated ethical standards regarding privileged communications. Id. at 748. Additionally, the Third Circuit noted that Moscony did not offer to forego cross-examination of the other defendants who he had previously represented. Id. at 751.

In Stewart, *supra*, the Third Circuit upheld a District Court's disqualification of counsel from a criminal trial because the same firm had been representing the defendant and government witnesses from the criminal trial together in a parallel civil trial. Stewart, 185 F.3d at 119. The government had granted immunity to the government witnesses in the civil trial in exchange for their participation with the government in its prosecution of the defendant. Id. The trial court found conflict notwithstanding the witnesses' waiver of conflict and consent to have their attorney represent Stewart in the criminal trial, because the attorneys, in defending Stewart, would be "directly adverse" to their representation of government witnesses and put the attorneys in the "unenviable position of cross-examining their own clients with the help of attorney-client communications." Id. at 120.

In Hawkins, this Court did not disqualify Hawkins' counsel, though he had previously represented a government witness during grand jury proceedings, because the role of that witness in Hawkins' trial did not create a conflict substantial enough to overcome Hawkins' Sixth Amendment right to be represented by the counsel of his choice. 2004 WL 2102017 at *8. This Court ruled the conflict to be minor, in part because the government relied on the affected witness only in connection with one of the several charges against Hawkins, and was capable of proving this charge in other ways. Id. at *7. Also of significance was the fact that Hawkins' counsel had co-counsel who, with Hawkins' consent, would exclusively cross-examine the witness in question, and would not be privy to any confidential information from the prior attorney-client relationship. Id. at *7-*8.

In United States v. Cooley, Cooley's defense attorney was disqualified because he had previously represented two key government witnesses against Cooley whom he would

necessarily cross-examine at trial, notwithstanding the attorney's assurances to the District Court that he possessed no confidential information from the witnesses and Cooley's waiver of conflict. 243 F.Supp. 2d 329, 334 (W.D. Pa. 2003). The District Court held the circumstances inescapably presented divided loyalties for the attorney, who in defense of Cooley must cross-examine former clients, Id. at 332, and further rejected assurances by the attorney of no conflict or potential for conflict, as the trial was in its nascency, and its unfolding could not be predicted. Id. at 331. Nor did Cooley's conflict waiver sway the court's analysis, which instead found decisive weight in the additional five factors of protecting client/attorney candor, maintaining respect for the court in general, enforcing the ethical rules of the legal profession, protecting the truth-seeking function of each trial, and protecting a fairly-rendered verdict from post-trial attack on appeal. Id. at 333-34 (citing Moscony, 927 F.2d at 749).

As noted above, the evidence indicates that Mr. Shuman had an attorney-client communication with one CSC employee, Mr. Sinyukov, during the few minutes of their private discussion outside the grand jury on February 16, 2005, but the contents of it were immediately disclosed to the government.

The facts are ambiguous as to Mr. Shuman's representation of Ms. Pyasik. However, there is no evidence of confidential communications between her and Mr. Shuman.

Third Circuit precedent does not demand Mr. Shuman's disqualification for actual or potential conflict as a result of his limited former counselor relationship with Mr. Sinyukov and his present representation of the Lebeds.

Here, as in Hawkins, the nature and degree of the conflict is minor, and does not overcome the defendants' Sixth Amendment right to legal representation of their choosing. The

attorney-client relationship between Mr. Shuman and Mr. Sinyukov was extremely brief, and consisted of information which Mr. Shuman immediately conveyed to the AUSA, and which Mr. Sinyukov later told the grand jury. Unlike Moscony, where an extensive previous attorney-client relationship existed between several important government witnesses and the defendant's lawyer, Mr. Shuman's involvement as attorney for Mr. Sinyukov is here found to be minimal and brief.

Therefore, as occurred in Hawkins, a condition of Mr. Shuman continuing as counsel to either of the Lebeds is that, in the eventuality that Ms. Pyasik or Mr. Sinyukov testified at trial the cross-examination must be performed entirely by Mr. Shuman's co-counsel. Such a rule avoids potentially placing Mr. Shuman in the Catch-22 position described in Stewart and Moscony of either depriving his client of his or her Sixth Amendment right to effective assistance of counsel by constraining his questioning of Ms. Pyasik or Mr. Sinyukov, or cross examining a prior client.

B. The Issue of Joint Representation

Statutory and case law authorities offer some guidance on the question whether Mr. Shuman's joint representation of the Lebeds ought to disqualify him as counsel for either.

Joint representation *per se* does not constitute a conflict of interest. Holloway v. Arkansas, 435 U.S. 475, 482 (1978). However, Rule 44(c) of the Federal Rules of Criminal Procedure treats joint representation in a criminal trial as an arrangement of particular concern. Rule 44(c) provides:

Whenever two or more defendants . . . are represented by the same retained and assigned counsel . . . the court shall promptly inquire with respect to such joint representation and shall personally advise each defendant of the right to effective assistance of counsel, including separate representation. Unless it appears that there is

good cause to believe no conflict of interest is likely to arise, the court shall take such measures as may be appropriate to protect each defendant's right to counsel.

Similarly, the Third Circuit perceives a likelihood of attorney conflict in joint representation of criminal co-defendants, noting, "the typical scenario where disqualification becomes necessary entails an attorney's attempt to represent multiple defendants in the same prosecution." Stewart, 185 F.3d at 120; see also Gambino, 864 F.2d at 1070 ("[C]onflict problems are more likely to arise in cases involving joint representation in a single proceeding. . .").

A waiver of conflict by co-defendants does not eliminate the tendency toward conflict created by joint representation. E.g. Moscony, 927 F.2d at 749 ("Usually, the various rights and duties of the attorney clash when a defendant seeks to waive his right to conflict-free representation in circumstances in which the counsel of his choice may have divided loyalties due to concurrent . . . representation of another client who is a co-defendant [or] co-conspirator. . .").

Joint representation threatens to create conflict particularly in complex trials, notwithstanding attorney assurances about trial strategy or planned defenses, because the course of the proceeding is not predictable. E.g. Stewart, 185 F.3d at 122 (upholding District Court's rejection of defense counsel's assurances that no conflict would flow from multiple representation because of defense strategy, where the trial was complex and client strategies were subject to change in response to unforeseen developments). Cases from the Third Circuit and this District have adhered to the principles above in resolving various disputes over attorney disqualification for joint representation and conflict flowing therefrom.

The leading case in this Circuit appears to be United States v. Dolan, 570 F.2d 1177 (3d Cir. 1978). In this case, the district court had granted a mistrial and ordered an attorney to withdraw from representing either of two defendants; on appeal, this decision was upheld. The court emphasized the uncertainty that accompanies a single attorney representing two defendants in a complex case. Both Judge Lacey in the trial court and Judge Rosenn, speaking for the Court of Appeals, emphasized the difficulty of a truly knowledgeable waiver in the pretrial stages of what would be a very complex trial. Not only are the defendants themselves unable to fully understand the dangers that lurk beneath the surface, but the trial judge himself does not know the defenses to be raised on behalf of each defendant and the weight and sufficiency of the evidence to be adduced against each defendant.

This Court finds that these dangers are emphasized when the defendants, as in this case, are husband and wife who jointly participated in the operation of a business that is the focal point of the indictment. The complexity is increased by the presence of two forfeiture counts seeking recovery of approximately \$13,000,000 in assets. In this situation, Mr. Shuman, although desiring to represent both defendants, might be placed in an impossible and intractable situation where he cannot give cogent advice to both defendants at the same time, particularly during the trial. Each defendant may have a different recollection of certain events, one defendant may be tempted to blame the other for a certain series of acts or omissions, and each defendant has a natural inclination to minimize his or her own involvement in any evidentiary facts that are incriminating. If Mr. Shuman is representing both of these defendants, he cannot give either one

truly independent advice.³

Under all the circumstances, the Court will allow Mr. Shuman to represent only one of the two defendants, and that defendant must have co-counsel throughout the pretrial and trial proceedings so that co-counsel, and not Mr. Shuman, will be available to cross examine Ms. Pyasik and Mr. Sinyukov.

At the hearing now scheduled for August 17, 2005, the Court will explore with both defendants as to their desire to be represented either by their present counsel other than Mr. Shuman, and their willingness to be represented by Mr. Shuman and his present co-counsel. If either defendant is unwilling to have Mr. Shuman and co-counsel as counsel throughout the pretrial and trial proceedings, then Mr. Shuman will not be able to represent either defendant. The Court will inquire of counsel and both defendants at this hearing on the topics set forth in this opinion.⁴

An appropriate Order follows.

³A separate issue is raised as to whether either defendant wishes to assert that marital privilege may interfere with the right against self-incrimination and whether a severance is appropriate or necessary. See United States v. Dobson, Crim. No. 02-CR-616, 2003 WL 22427984 (E.D. Pa. 2003) (Baylson, J.). The Court expects any motion for severance to be made promptly or else the Court may consider the issue to have been waived.

⁴The Court notes that defense counsel in this case will undoubtedly form a joint defense agreement so that they may work together with themselves and their clients. Thus, even though each defendant will have their own counsel at trial, Mr. Shuman's participation in the joint defense agreement will make his knowledge of the case, to date, available for purposes of pretrial coordination and joint defense strategy. See United States v. Kemp, 375 F. Supp. 2d 375 (E.D. Pa. 2005) (Baylson, J.).

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LARISA LEBED	:	

ORDER

AND NOW, this 12th day of August, 2005, upon consideration of Defendants' Motion to Disqualify Arthur R. Shuman, Esquire (Doc. No. 38), in accordance with the foregoing Memorandum, the Motion is GRANTED in part and DENIED in part. The Court will make further Orders in connection with this motion following the hearing, now scheduled for August 17, 2005 at 4:30 p.m. in Courtroom 3A.

BY THE COURT:

s/Michael M. Baylson
Michael M. Baylson, U.S.D.J.